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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

NO. 75-1006

CAROLEE BIDDY,
Petitioner,

V.

FRED DIAMOND, SHERIFF, JACKSON COUNTY JAIL, and JACK REED, WARDEN OF THE MISSISSIPPI STATE PENITENTIARY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[redacted]

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BRIEF OF PETITIONER

The petitioner, Carolee Biddy, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Mississippi Supreme Court's opinions on appeal and on rehearing; the opinion of the United States District Court for the Southern District of Mississippi; and the opinion of the United States Court of Appeals for the Fifth Circuit appear in Appendices A, B, C, and D respectively. The opinion of the Supreme Court of Mississippi is reported as *Biddy v. The State*, 277 So. 2nd 115 (Miss. 1973). The opinion of the Court of

Appeals is reported as *Biddy v. Diamond*, 516 F.2d 118 (5th Cir. July 18, 1975).

JURISDICTION

The jurisdiction of this appeal is grounded in a July 18, 1975 decision of the United States Court of Appeals for the Fifth Circuit affirming a judgment of the United States District Court for the Southern District of Mississippi, and a September 8, 1975 denial of a Petition for rehearing by the United States Court of Appeals for the Fifth Circuit. An extension of time for filing the Petition for Writ of Certiorari up to and including January 15, 1976 was granted on December 1, 1975 by Lewis F. Powell, Associate Justice of the Supreme Court. The statutory provision conferring jurisdiction for this appeal is 28 U.S.C. Section 1254.

QUESTIONS PRESENTED FOR REVIEW

1. IS *MIRANDA V. ARIZONA*, 384 U.S. 436, 16 L.Ed 2d 694, 86 S.Ct. 1602 (1966), VIOLATED IN THE FOLLOWING CIRCUMSTANCES:

   A. Whether Petitioner's December 15, 1970, written waivers of her Sixth Amendment rights were vitiated in view of her request for "her lawyer" on December 15, 1970, after she signed said waivers.

   B. Whether, apart from Petitioner's request for her lawyer on December 15, 1970, the written waivers of December 15, 1970, were "stale" twelve days later on December 27, 1970, when the police induced damaging statements from her, which statements were admitted into evidence at her state trial.

   C. Whether the oral warning (not conceded by Petitioner) given to Petitioner on December 27,

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1970, just prior to the taking of the damaging admissions by the police, was an effective *Miranda* warning in light of Petitioner's request for "her lawyer" on December 15, 1970.

D. Whether *any* form of warning given on the morning of December 27, 1970, could comport with the requirements of *Miranda* when the police officer who claims to have given the warning, induces the damaging statements, after the Petitioner's attorney left the police station because of illness, and before the arrival of a second attorney known by the police to be on his way to represent Petitioner, and whether said damaging statements elicited on December 27, 1970, can be admitted against her at her state trial.

E. Whether damaging admissions and conduct of Petitioner, induced by the police without any *Miranda* warning on the morning of December 28, 1970, after her arrest and when the police were specifically told by Petitioner's counsel that they were not to further question her can be admitted in evidence against her at her state trial.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment, United States Constitution:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; . . .

Sixth Amendment, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

Fourteenth Amendment, United States Constitution:

> Section 1 . . . nor shall any State deprive any per-

son of life, liberty, or property, without due process of law; . . .

PREFATORY STATEMENT

References to the preliminary hearing in the State proceedings will appear with the abbreviation "P. Tr."; References to the first trial will appear as "1st Tr."; References to the second trial will appear as "2d Tr."; and References to the District Court Habeas Corpus proceeding will appear as "D.C. Tr."

STATEMENT OF THE CASE

The first trial of Petitioner for the murder of her six year old stepdaughter, Mona, resulted in a mistrial. At the second trial, on September 5, 1971, Petitioner was convicted by a jury of manslaughter and sentenced to a term of twenty years in the state penitentiary where she currently is incarcerated. The Mississippi Supreme Court affirmed her conviction (Appendix A) and denied a petition for rehearing (Appendix B).

A Petition for a Writ of Certiorari was filed with this Honorable Court and was denied, as was a Petition for Rehearing. Thereafter, in January of 1974, a Petition for Writ of Habeas Corpus was filed in the United States District Court for the Southern District of Mississippi. After a lengthy evidentiary hearing, the Petition was denied; however, the Court did issue a certificate of probable cause to the United States Court of Appeals for the Fifth Circuit. An appeal taken to that court was finally denied, after a Petition for Rehearing, on September 8, 1975 (Appendix D).

During the first trial an evidentiary hearing was held outside the presence of the jury, regarding the admissibility of statements made by Petitioner to law

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enforcement officers on December 27 and 28, 1970. (See Appendix E and F respectively). By stipulation, this evidentiary hearing was made a part of the record of the second trial, whereupon defense counsel orally renewed his motion to suppress the Petitioner's statements, declaring that "[t]he defendant objects to . . . the admissibility of the statement in its entirety . . ." (2d Tr. 53-54). The trial judge denied this motion, stating, "I will rule that the *Miranda* requirements have been met . . . and that the statements are admissible." (2d Tr. 55). In her motion for a new trial, Petitioner alleged that "[t]he Court erred in allowing the statement made on December 27, 1970, to be introduced in evidence, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States" (2d Tr. 1074). On appeal to the Mississippi Supreme Court, Petitioner contended that "[t]he two oral statements made by appellant were inadmissible under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States" and *Miranda v. Arizona*, *supra*, (Brief of Appellant to the Mississippi Supreme Court at 14-25).

Petitioner respectfully submits the following chronology with respect to the *Miranda* issues:

1. On December 3, 1970, Petitioner reported the disappearance of her six-year-old mentally retarded stepdaughter, Mona Biddy (2d Tr. 62, 73, 82, 278). Jackson Police Officers Wesley Reeves and Harry Price first talked with Petitioner at home on December 4. On December 8, Mona was found dead at the Barnett Reservoir, about thirteen miles from Petitioner's home (2d Tr. 294, 300).

2. On December 15, 1970, in the morning, the officers called Petitioner to police headquarters to identify an

article of Mona's clothing. They honored her request to have her husband present (2d Tr. 279), but then the two officers and an assistant prosecuting attorney took her to a room by herself and asked her to recite the details of the disappearance, which she did. Petitioner was then advised of her *Miranda* rights by Officer Price, signed a written waiver, and was questioned as to her involvement which she denied; the questioning then ceased (2d Tr. 280-282, 304, 339-341, 360-363). Police then told Petitioner's husband "that we thought that Mrs. Biddy was involved in the disappearance of Mona Biddy" (2d Tr. 341). Mr. Biddy was not questioned about his involvement in Mona's disappearance because, by that time, the police had focused their suspicions on Petitioner (2d Tr. 304).

3. On December 15, 1970, in the afternoon, prior to taking a polygraph test, while at the Mississippi Highway Patrol Headquarters, Petitioner signed a second written waiver of her Sixth Amendment rights in the presence of Officer Dewey Weems (D.C. Tr. 69-70).

4. During the polygraph test and after signing a written waiver, Petitioner told Officer Dewey Weems, the examiner, that *she wanted "her lawyer."* This crucial declaration that Petitioner wanted "her lawyer" is *new evidence* in this case, discovered for the *first time* in the course of Officer Weems' testimony below (D.C. Tr. 67), and corroborated by the testimony of Officer Reeves (D.C. Tr. 22). Therefore, this most significant, and now undisputed fact, could not be presented to this Honorable Court in the prior Petition for a Writ of Certiorari.

5. Officer Weems immediately stopped the polygraph test and any further questioning of Petitioner (D.C.

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Tr. 67-68). Thereafter, he recorded these events in certain hand-written notes (D.C. Tr. 68). He next reported to either Officer Reeves or Officer Price that Petitioner had asked for "her lawyer" (D.C. Tr. 68). Officer Reeves was then told by Petitioner that *she wanted "her lawyer."* Again, these facts were absent from Petitioner's prior presentation to this Court.

6. The police then permitted Petitioner to leave the Highway Patrol Headquarters to go to her home (D.C. Tr. 221), but requested a further opportunity to question her. Mr. Biddy, who was accompanying his wife, told the police to arrest her or come to their home to see her (D.C. Tr. 61).

7. On December 15, 1970, not long after Petitioner returned from the Mississippi Highway Patrol Headquarters, Officers Reeves and Price met with her, her husband, and Attorney Charles Wright at the Biddy home (D.C. Tr. 81). Attorney Wright *did not permit any questioning of Petitioner*, stating ". . . this was neither the time nor place . . ." (D.C. Tr. 38). The officers departed without questioning Petitioner and without seeking Attorney Wright's permission to question her further (D.C. Tr. 38). Nor did the officers contact Attorney Wright between December 15 and December 27, 1970 (D.C. Tr. 38).

8. The next night, December 16, 1970, the two officers responded to a call from the Biddy home, where Petitioner told them of escaping in her backyard from an unknown male attacker who stabbed her in the hip (2d Tr. 284-285).

9. During the night of December 26, 1970, Officer Reeves responded to another call from the Biddy home reporting that their two-and-a-half year old daughter,

Candice, had been kidnapped, and then found in the backyard (2d Tr. 285-286).

10. Between the evening of December 15 and the morning of December 27, 1970, Petitioner did not discuss the disappearance or death of Mona Biddy with any law enforcement officer (D.C. Tr. 144). Parenthetically, Petitioner calls to the Court's attention that neither she, Attorney Wright, nor Attorney Poole were witnesses at the suppression hearing held in connection with the State Trial, but were witnesses below.

11. On December 27, 1970, Officers Reeves and Price, acting under orders of Police Chief Lavell Tullos, told Petitioner and her husband to report to the Police Department for further questioning about the disappearance and death of Mona Biddy (D.C. Tr. 85-87). This occurred after Mr. Biddy had informed the police that he and his wife were about to leave the state on a trip to Georgia (D.C. Tr. 85). The two officers had secured Mr. Biddy's promise to notify them before leaving for a visit with Mr. Biddy's father (2d Tr. 288, 309, 389). Thereafter, the officers arrived at the Biddy residence and asked the Biddys to accompany them to headquarters. Petitioner did not want to go and told the officers so (D.C. Tr. 145-146). The officers advised her she had to go to the Police Station (D.C. Tr. 146) and would have made her go if she refused (D.C. Tr. 278).

12. The Biddys then left their home with the officers. Before leaving the grounds, they encountered Mal Sims, Mr. Biddy's business partner (D.C. Tr. 27-29). Mr. Biddy told him to go to the nearest phone, call Attorney Charles Wright, and tell him to come to the Police Station "*for him and Petitioner.*" Mr. Sims called Attorney Wright and requested him to go to the jail

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(D.C. Tr. 30). Officers Reeves and Price knew "that Mr. Mal Sims was going to call their (sic) *lawyer for them.*" (2d Tr. 316) (Emphasis Supplied).

13. Petitioner and her husband proceeded to the Police Station in their own car with the officers following. (D.C. Tr. 88-89).

14. Immediately upon arrival at Headquarters, Mr. Biddy told both officers that he desired Attorney Wright's presence before Petitioner was questioned, and that he (Mr. Biddy) desired to be present for any questioning (D.C. Tr. 89). The Biddys were placed in separate interrogation rooms, the police advising Mr. Biddy they wanted to talk to him first (D.C. Tr. 90). The door leading into the interrogation room area is always locked. Neither the person being interrogated nor counsel can gain entrance or exit to the room without the assistance of a police officer (D.C. Tr. 10-11). Petitioner was extremely fatigued and distraught and fell asleep while the police questioned Mr. Biddy (D.C. Tr. 98, and 148). The police officers apparently totally ignored the fact that Attorney Wright had been summoned and continued their interrogation of the Biddys.

15. Prior to ordering the Biddys to the Police Station, the police officers had spoken with Mal Sims, Mr. Biddy's business partner, and Ted E. Biddy, Mr. Biddy's father, about Petitioner's mental and emotional condition, and about having her placed under psychiatric care or committed to an institution. (Affidavit of Mal Sims, Exhibit Applicant-5 and Affidavit of Ted E. Biddy, p. 163, Vol. 1, Record on Appeal). Officer Reeves testified that about eight o'clock in the morning of December 27, 1970, the two officers met with Mr. Sims, solely "to get his opinion of what was going on";

and that Sims said Mr. Biddy's father had called Mr. Sims, expressing a desire to talk to Officer Reeves. Mr. Sims testified at the second trial that the reason the two officers gave for meeting him:

> . . . was to ask me if I'd contact Ted Biddy and talk to him about having his wife, let's say 'removed' from the house, so far as we all agreed that she obviously, or most probably, had hurt herself, and could potentially someone else . . . and they would like for me to talk to him, and get him to—I think the way it was put, *to get him from between the police and Mrs. Biddy*, and they wanted me to talk to him about trying to have her placed under some medical care . . . (2d Tr. 407-408) (Emphasis Supplied).

Mr. Sims told the detectives he would do what he could and they all agreed he would talk to Mr. Biddy's father (2d Tr. 408). Within two hours, Mr. Sims called Mr. Biddy's father, which Mr. Sims dutifully reported to Officer Reeves; Mr. Sims gave Officer Reeves Mr. Biddy's father's phone number, suggesting that Officer Reeves call him himself (2d Tr. 383, 408-409). Within an hour, Officer Reeves did call Mr. Biddy's father, informing him that though Petitioner and her husband were planning a week's visit with him, they would "probably be detained" for further questioning. According to Mr. Biddy's father, Officer Reeves stated that this was a "dangerous situation" akin to "mass murders and suicides" and that "this girl has got to have psychiatric care, either voluntarily or compulsory" (2d Tr. 310-311, 383-385).

16. Before Attorney Wright arrived at the police

station, the officers told Mr. Biddy that he had two choices: (a.) commit Petitioner to a mental hospital, or (b.) the police would hold her on a "dangerous psychotic charge" (D.C. Tr. 90-91). The officers expressed these same sentiments to Attorney Charles Wright when he arrived at the police station, and to Mr. Sims earlier on the morning of December 27 (D.C. Tr. 41, 91 and Affidavit of Mal Sims, Exhibit Applicant-5). The officers then told Mr. Biddy they suspected that his wife was involved in Mona's death; that much of what Petitioner had told Mr. Biddy about the circumstances of Mona's disappearance was untrue; that Petitioner was having an affair with her ex-husband; and that three witnesses had seen a woman matching Petitioner's description at the Main Harbor Marina on the night of December 2, 1970 (D.C. Tr. 125-126). More specifically, the officers told Mr. Biddy that the clothing store denied Petitioner's assertion that she modeled for it, raising the question of the actual source of the clothes she brought home (2d Tr. 290, 319, 393); that his wife was not going to a health studio every week as she claimed, leaving the inference that "(s)he was going somewhere (else)" (2d Tr. 290, 321, 353, 393); that "our investigation" showed that the attack Petitioner claimed on December 16, 1970 could not have happened "that way" but was "a fake"; that the stabbing was "self-inflicted" (2d Tr. 290, 320, 353, 393); and that the kidnapping of Candice was a "hoax" (2d Tr. 290, 321, 354, 394). The officers succeeded in convincing Mr. Biddy that his wife had probably faked these last two incidents (2d Tr. 290, 394). They then asserted that Petitioner was implicated in Mona's disappearance or death (2d Tr. 394), in an acknowledged effort to enlist his help in solving the case by talking with her (2d Tr.

354-355). The true significance of the above efforts to discredit Petitioner in her husband's eyes can be appreciated only in light of the officers' overall attempt to make Mr. Biddy believe that there existed a clandestine relationship between Petitioner and her ex-husband, Roy Dunn (2d Tr. 392-393).

17. Mr. Biddy, upset by the information supplied by the police, asked to be alone with his wife, but the officers would only permit conversation between husband and wife in their presence (D.C. Tr. 126).

18. Again, ignoring the fact that Attorney Wright had been summoned to represent the Biddys, the officers hurriedly attempted to conclude their interrogation of Petitioner by bringing husband and wife together in the interrogation room where Mr. Biddy had been talking with the police (D.C. Tr. 126).

19. Caught between the police telling him that his wife was a liar, and his instinctive desire to protect her, Mr. Biddy began to repeat to his wife what the officers had just told him and to question her prior to Attorney Wright's arrival (D.C. Tr. 92 and 127). Neither Petitioner nor Mr. Biddy received any type of *Miranda* warnings during this time (D.C. Tr. 127-128). Between the time that the police had their discussion with Mr. Biddy and the time he began to talk with his wife the officers never discussed with him or Petitioner the fact that Attorney Wright was not present. Moreover, Mr. Biddy and Petitioner were not asked whether they wanted Attorney Wright to be present (D.C. Tr. 92). After Mr. Biddy began to question his wife in the presence of the officers, Officer Reeves received a telephone call. He left the room for about five minutes, returned, and took Mr. Biddy to Attorney Wright

(D.C. Tr. 127-128).

20. Attorney Wright and Mr. Biddy conferred in a small room ". . . immediately outside the interrogation area or immediately inside . . . " (D.C. Tr. 130). Mr. Biddy told Attorney Wright that Petitioner needed a lawyer, and asked him to see her. He did not tell the Attorney that she was being questioned (D.C. Tr. 131-132), and Officer Reeves did not tell Attorney Wright that Petitioner was being questioned only a few feet away (D.C. Tr. 208-209).

21. Attorney Wright was told by Officer Reeves that Petitioner was dangerous to herself and other people, and that the police were going to hold her on a dangerous psychotic charge. There was no mention of a murder charge. Officer Reeves never informed the lawyer that Petitioner was being questioned at that very moment. Attorney Wright was not asked whether Petitioner would waive her right to have her lawyer present (D.C. Tr. 40-42). Officer Reeves did not take Attorney Wright to the interrogation room where Petitioner was being detained. Attorney Wright told Officer Reeves that he was ill, and that Attorney John Poole would come to Headquarters to represent Petitioner (D.C. Tr. 42-43). Attorney Wright found Mr. Biddy in an excited and nervous state, more so than the lawyer had ever seen him (D.C. Tr. 43-44).

22. After Attorney Wright departed, Mr. Biddy and Officer Reeves returned to the interrogation room where Petitioner and Officer Price had remained. Neither Mr. Biddy nor the police officers told her that her lawyer had arrived, left because of illness, or that Attorney Wright intended to call Attorney Poole (D.C. Tr. 95, 96 and 151). Neither Mr. Biddy nor Petitioner recall

either officer asking her if she "understood her rights" (D.C. Tr. 99 and 176-177). The officers did not tell Petitioner that she had a right to have Attorney Wright or any lawyer present or that she had a right to remain silent (D.C. Tr. 151). However, the officers did tell her and Mr. Biddy that if Petitioner told the truth, there would be no charges brought (D.C. Tr. 152). Mr. Biddy, prodded by the officers, continued to talk with his wife in their presence between the time Attorney Wright left and Attorney Poole arrived (D.C. Tr. 131). It was at this point in time that Petitioner began to make the December 27 statement which appears as Appendix E to this Brief. The Officers then took over the questioning of Petitioner (D.C. Tr. 133). They told her that they had always believed Mona's death was accidental; that she ought to tell them the whole story; and that there would be no charges brought against her. She believed the police and made the damaging statement in issue, revealing a series of hoaxes perpetrated by her after finding her stepdaughter dead in bed, a few hours following the child's ingestion of a poisonous lye Liquid Plum'r. Petitioner steadfastly denied killing the child, maintaining that the death was accidental (D.C. Tr. 98, 1-3, 151-152 and 175-178).

23. Neither Mr. Biddy nor Petitioner recall that Mr. Biddy read her the *Miranda* warnings after she gave her oral statement around noon on December 27, 1970 (D.C. Tr. 93-94 and 152). The circumstances surrounding the taking of the statement are the following: (a) Petitioner, who had slept no more than two hours the night before, had been kept in a small room for over an hour while the detectives spoke with her husband (2d Tr. 318, 388, 396); (b) the detectives knew that Petitioner had a history of "mental prob-

lems", having undergone four weeks of shock treatment at an institution whose psychiatrist recommended a legal abortion because of these problems (2d Tr. 313, 465); (c) Petitioner had undergone treatment for emotional problems during three weeks preceding December 27, 1970 by four different doctors (Said treatment included prescription of tranquilizers) (2d Tr. 386-388); (d) Petitioner, whose questioning on December 15 was terminated because she was crying (2d Tr. 341, 364), was described by her husband as being in a dazed and hysterical state on December 27 and, by a detective, as crying sufficiently to make her eyes swollen (2d Tr. 333, 396-397, 400, 403).

24. Attorney Poole then arrived at the Police Station in a jump-suit, as it was the weekend (D.C. Tr. 5). He conferred with the Biddys for about thirty minutes (D.C. Tr. 8). Learning of the events which had transpired between his arrival and Attorney Wright's departure, *he told both officers that he did not want Petitioner to make any further statements, oral or written* (D.C. Tr. 7-8). He told her not to make any further statements to the police officers, told the officers he would return in the morning, and departed with Mr. Biddy (D.C. Tr. 7-8).

25. Attorney Poole, accompanied by Mr. Biddy, immediately went to Chief of Police Lavell Tullos' office, to inquire if Petitioner would be charged. The conference with the Chief was inconclusive (D.C. Tr. 9). After Attorney Poole departed, Petitioner was charged with murder.

26. During the evening of December 27, 1970, the same police officers who had questioned her earlier that

day and who had been told *specifically* by Attorney Poole not to seek any further statements from Petitioner, went to her cell; asked if she wanted food; *attempted to have her sign a written statement;* told her that their heads had been on the chopping blocks for weeks over the case; told her that they could get her out of jail and that Attorney Poole could not; advised her that she did not need a lawyer if she was telling the truth; and, upon her refusal to sign the statement, hurriedly returned her to her cell (D.C. Tr. 154-157).

27. On December 28, 1970, very early in the morning, the two police officers who had taken the oral statement on December 27, and had sought unsuccessfully to elicit a written statement that evening, again ignored Attorney Poole's specific instructions not to question his client and *knowing full well that her lawyer would soon arrive* at the Police Station, took Petitioner from her cell to the reservoir where Mona's body was found (D.C. Tr. 157-161). It is clear and undisputed from the testimony below that no *Miranda* warnings in any form were given Petitioner (D.C. Tr. 159, 254). While traveling to or from the reservoir, Officer Reeves again impugned Attorney Poole by stating that his last client had been sentenced to 45 years and that the Attorney did not spend more time with Petitioner because he was in a hurry to get back to the football game (D.C. Tr. 162). While on the trip to the reservoir, Petitioner made certain statements and did certain acts which were admitted in evidence against her (See Appendix F).

28. Upon the return of the officers and Petitioner to the jail, Attorney Poole and Ted Biddy were waiting to see her (D.C. Tr. 12-13).

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REASONS FOR GRANTING THE WRIT

EXPLICATION OR REAFFIRMATION OF *MIRANDA V. ARIZONA* BY THIS COURT IS NECESSARY TO RESOLVE THE CRITICAL LEGAL QUESTION WHETHER THE CONDUCT OF THE POLICE SUFFICIENTLY COMPORTS WITH THE *MIRANDA* WARNING REQUIREMENTS TO INSULATE PETITIONER'S CONDUCT AND ADMISSION AGAINST SUPPRESSION. THIS SECOND PETITION COMES BEFORE THIS HONORABLE COURT IN AN ENTIRELY DIFFERENT FACTUAL POSTURE BECAUSE OF NEW UNDISPUTED EVIDENCE THAT PETITIONER DID REQUEST HER LAWYER ON DECEMBER 15, 1970, TWELVE DAYS BEFORE THE DAMAGING STATEMENTS WERE ELICITED FROM HER BY THE POLICE OUT OF THE PRESENCE OF HER LAWYER.

A. WHETHER PETITIONER'S DECEMBER 15, 1970, WRITTEN WAIVERS OF HER SIXTH AMENDMENT RIGHTS WERE VITIATED IN VIEW OF HER REQUEST FOR "HER LAWYER" AFTER SHE SIGNED SAID WAIVERS.

It has never been disputed that Petitioner signed two written waivers on December 15. The question simply put is whether the waivers were rendered null and void when, on December 15, she requested "*her lawyer*" after signing the second waiver. This crucial evidence did not surface during the suppression hearing held in the first state trial and incorporated by stipulation in the second trial. Petitioner's December 15 request for counsel, strangely absent from the record of this case prior to the evidentiary hearing in the District Court, now is undisputed (D.C. Tr. 67, 142, 221,

and 276). In this new factual posture, it becomes important to emphasize that the Mississippi Supreme Court, on Petition for Rehearing, by Justice Inzer, stated four times in a three and one-half page decision that *there was no evidence in the record before them that Petitioner had requested counsel:*

> After a careful search of the record, we find that *nowhere in this record* does Mrs. Biddy, the Appellant, request, indicate, hint or express a desire to speak with or consult an attorney; although she was well aware that an attorney was available. *Nowhere in any shape, form or fashion does she express a desire to have an attorney present* during any questioning, nor does her husband express any wish or desire to have an attorney present.
>
> . . .
>
> *She never at any time expressed any desire to speak with or consult with the attorney with whom her husband conferred.* Neither did she express any desire to consult with any other attorney or have an attorney present before she made any statement. A statement made under these circumstances certainly should be and is admissible in evidence. (Appendix B, p. 2b and 4b) (Emphasis Supplied).

Such language compels the recognition that the new evidence that Petitioner did indeed request "her lawyer" on December 15 gives an entirely new factual and legal posture to this case. The Court of Appeals at 121 concluded that the point herein presented ". . . would not control the outcome of this appeal." Petitioner contends that it does because if the December 15 waivers were vitiated by her undisputed request for counsel, then the *complete Miranda* warning process *must* be repeated when the police next questioned Petitioner on December 27. Petitioner's position is strengthened by

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the 12-day hiatus between the interrogations and by her emotional condition on December 27. It is submitted that the request for counsel on December 15 placed a heavy constitutional burden on the police officers to give a full *Miranda* warning, and, at the very least, the "right to counsel" admonition, on December 27. At best, (and not conceded) Petitioner was asked *only* "whether she remembered her rights." In holding that such a warning, in the factual context of this case, meets the *Miranda* criteria the Court of Appeals for the Fifth Circuit virtually rendered that decision a nullity. Surely, the additional few moments required to give full *Miranda* warnings on December 27 militate in favor of Petitioner's position. The police conduct complained of easily leads to a conclusion that the officers, perceiving the opportunity to overreach Petitioner, succeeded in capitalizing on the weak warning (not conceded) to circumvent her prior request for her lawyer. This, coupled with the conduct of police hereinafter set forth, clearly demonstrates a conscious effort to violate Petitioner's right to counsel. Such police conduct should not be permitted by this Honorable Court.

Petitioner respectfully submits that the fact that the police officers did not testify at the state trial that she had requested "her lawyer" on December 15, but have testified in the District Court that such a request was made, raises serious questions bearing on the good faith, reliability and credibility of their entire testimony.

At the District Court hearing, Dewey Weems of the Mississippi Highway Patrol was a witness for Petitioner. He testified he told either Officer Reeves or

Price that Petitioner requested her lawyer on December 15 (D.C. Tr. 68). Yet at the state trials, Officer Reeves could not recall Petitioner's request for "her lawyer." And as late as the evidentiary hearing below, April 11, 1974, he was having difficulty recalling Officer Weems informing him of Petitioner's request:

Q. Did you on the same day that that waiver was signed learn that Mrs. Biddy had asked for her lawyer?
A. At a later time, yes, sir.
Q. On that day?
A. On another occasion.
Q. At the highway patrol?
A. Yes, sir.
Q. You learned that the polygraph test had been stopped because she made that request, right?
A. I didn't at that time, all I knew was she said I want a lawyer and my husband, and we let her go.
Q. Well, didn't Detective Weems tell you that he had stopped the test, shorted its completion because she made that statement?
A. Not at that time, possibly later after they had gone home. I don't remember that, no sir.
Q. Did you to this day remember him telling you that she had made that request to him and it caused him to stop the test?
A. I can't remember it, he could have but I don't remember it.
Q. But you do know of your own personal knowledge that she made that request to you or within your earshot?
A. Yes, sir.
(D.C. Tr. 220-221).

Furthermore, a comparison of Officer Price's testimony, with reference to December 15, raises a serious

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question as to his credibility:

Q. Did she at any time request of you to stop talking to her?
A. No, she didn't.
Q. Did she at *any time* tell you that *she wanted her attorney or any attorney?*
A. No, sir.

(2d Tr. 342) (Emphasis Supplied).

Yet on April 11, 1974, almost three years after the first trial, Officer Price bluntly stated:

Q. Did she ask for *an attorney* on that date? [December 15].
A. *Yes, sir.*

(D.C. Tr. 275-276) (Emphasis Supplied).

As experienced police officers, testifying at a trial where the central issue concerns Petitioner's inviolate right to counsel, it is indefensible that both officers, offered repeated opportunities to tell the state trial judge that Appellant had requested her lawyer on December 15, 1970, chose to withhold that fact until she was convicted; lost her state appeal; and learned that her Petition for Writ of Certiorari to the United States Supreme Court had been denied. Petitioner respectfully submits that had the request for her lawyer on December 15, 1970, been a part of the state trial record, the whole outcome of those proceedings of nearly three years ago would have been different.

Before the Habeas Corpus Petition was filed, the issue was: Whether *Miranda* is violated when police induce damaging admissions after an attorney left the police station because of illness, and before the arrival of a second attorney known by police to be on his way to see Petitioner. Now the issue before this Court is:

Whether *Miranda* warnings and subsequent waivers are totally nullified by a subsequent request for her attorney *by Petitioner herself* as well as on her behalf by her husband? Obviously, if a waiver is nullified by subsequent requests for an attorney, then inculpatory statements obtained twelve days after the nullified waiver, without administering new *Miranda* warnings are inadmissible.

Miranda itself contains the answer to this new issue:

> The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking *there can be no questioning . . .*
>
> If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual *must have an opportunity to confer with the attorney and to have him present during any subsequent questioning.*
>
> (Emphasis Supplied).

Miranda v. Arizona, *supra*, at 444-45, 474.

On December 15 *Miranda* warnings have been given, waivers obtained and questioning is proceeding pursuant to those waivers. Then Petitioner makes a request for counsel which nullifies those warnings and waivers and on December 27 "there can be no questioning . . . the interrogation must cease until an attorney is present."

B. WHETHER, APART FROM PETITIONER'S REQUEST FOR "HER LAWYER" ON DECEMBER 15, 1970, THE WRITTEN WAIVERS OF DECEMBER 15, 1970, WERE "STALE" TWELVE DAYS LATER ON DECEMBER 27, 1970, WHEN THE POLICE INDUCED DAMAGING STATEMENTS FROM HER, WHICH

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STATEMENTS WERE ADMITTED INTO EVIDENCE AT HER STATE TRIAL.

In *Brown v. State*, 252 A. 2d 272 (Md. 1969), the accused was interrogated and waived his *Miranda* rights one night and the next day was interrogated anew without a new warning. Holding the subsequent confession inadmissible, the Court stated that among the factors to be considered was whether the second interrogation was by "the same officer, or in the same place, or were close together in point of time . . ." Petitioner's case involves, not a one day but a twelve day hiatus, with no intervening interrogation.

The time periods tolerated have not even approached the instant twelve-day lapse. See *Maguire v. United States*, 396 F.2d 327 (9th Cir., 1968) (three days); *State v. Magee*, 245 A.2d 339 (N.J., 1968) (two and one-half days). The general rule, therefore, seems to be that "(q)uestioning may be interrupted for brief periods without having to give warnings anew . . . as long as the delay is not long enough to convert the matter into a separate transaction entirely." George, Jr., *Defending Criminal Cases* (PLI, 1969), at 161. Whether earlier warnings are sufficient for a later interrogation can only be determined by a case-by-case inquiry. *People v. Bynum*, 483 P.2d 1193 (Cal. 1971). In *Nettles v. State*, 248 So.2d 259 (Fla. 1971), the Court commented that if *Miranda* warnings are necessary, a warning given six days before a confession would *not* be sufficient. And, speaking broadly, the Court in *People v. Schenck*, 101 Cal. R. 75 (1972), stated that "where substantial intervals of time occur between the initial warning and the succeeding interrogation," a new warning may be required. Similarly, in *Franklin v. State*, 252 A.2d 487 (Md. 1969), the accused was

warned of his rights on September 4 and interrogated on September 5 and 6 without renewed warnings. The Court held a confession made on the final day inadmissible: "proof showing only that the *Miranda* warnings were given on September 4 would fall short of compliance with the dictates of the *Miranda* decision."

Even if Petitioner's waiver did not turn "stale," the *Miranda* warnings themselves lost effectiveness over the twelve-day interval between the December 15 warning and the December 27 interrogation and admissions. Petitioner respectfully contends that application of existing law demonstrates that the delay between interrogations required a new *Miranda* warning on December 27.

C. WHETHER THE ORAL WARNING (NOT CONCEDED BY PETITIONER) GIVEN TO PETITIONER ON DECEMBER 27, 1970, JUST PRIOR TO THE TAKING OF THE DAMAGING ADMISSIONS BY THE POLICE, WAS AN EFFECTIVE *MIRANDA* WARNING IN LIGHT OF PETITIONER'S REQUEST FOR "HER LAWYER" ON DECEMBER 15, 1970.

There is a critical factual dispute in the record below whether, on December 27, Petitioner was asked by Officer Reeves, in the presence of Officer Price, just prior to her making the damaging statement, but before Attorney Poole arrived at the police station, "Do you remember and understand the rights that we have given you before?" (D.C. Tr. 206). Officer Reeves gives the following District Court testimony on this point:

Q. Excuse me. Who wanted to talk to him? (Mr. Biddy)

A. Mr. Wright —

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Q. Wanted to talk to Ted Biddy?
A. Right. *And while they were talking I went back in the room with Mrs. Biddy and Lt. Price*, and I told Mrs. Biddy, I said there's a possibility that we'll want to talk to you a little later. *Do you remember and understand the rights that we have given you before?*
Q. What did she say?
A. She said yes, I do.

(D.C. Tr. 206-207) (Emphasis Supplied).

It is indeed significant that Officer Reeves made this inquiry during the few minutes that Mr. Biddy had left the room to confer with Mr. Wright. Perhaps, if Mr. Biddy had been present at that moment, he himself would have stopped the questioning. Indeed, Officer Reeves stated below:

Q. All right. Now, when you learned that the counsel who would initially been called by the Biddys' was sick and a replacement was on the way did you consider waiting until after he arrived before proceeding?
A. No, sir. But I did tell Mrs. Biddy, asked her if she remembered her rights and understood them, and she said she did.
Q. And you accepted that?
A. Yes, sir.
Q. You didn't take the couple of minutes it would have taken to re-read them?
A. No, sir.

This is just a further example of how the officers took advantage of Petitioner and her husband between the departure of Attorney Wright and the arrival of Attorney Poole. Petitioner has no recollection of this meager effort, if there was one, to ascertain whether she "understood the rights . . ." (D.C. Tr. 151-152,

176-177). Further aggravating the situation is the fact that both officers admit they did not tell her of Attorney Wright's arrival, which information would have been far more valuable and much less vague than the statement "Do you . . . understand the rights. . . ." Officer Price summed it up below when he said:

> She wasn't given the *Miranda* warning. She was asked 'Do you understand your rights', but she was never given the *Miranda* warning on this date (December 27, 1970). (D.C. Tr. 280).

Petitioner respectfully submits that since her request for her lawyer on December 15 nullified the earlier warnings and waivers, as if they never happened, questioning could not be resumed twelve days later on December 27 without giving a full *Miranda* warning. Otherwise, in view of her request for her lawyer, the police would be questioning Petitioner with *no Miranda* warning, which is precisely what they did on December 27. Hence, the only issue, assuming arguendo that Officer Reeves asked Petitioner if she understood her rights, is whether such a statement is a sufficient *Miranda* warning from which to infer another waiver of the right to counsel. This Court has already answered that in the negative holding that: "No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given." *Miranda v. Arizona*, *supra* at 470.

That a waiver, once made, can be withdrawn at any time is hornbook law. *Stevens v. Marks*, 383 U.S. 234, 243 (1966); 2 Han. Civ. Rts.—Civ. Lib. L.R. 144, 153 (1966); and 42 Notre Dame Lawyer 479-89. In *United States v. Crisp*, 435 F.2d 354 (7th Cir. 1970), the accused signed a waiver of rights and then merely said that he

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did not want to discuss the crime of bank robbery. The Court held that later conversations—admittedly not concerned with that bank robbery—were inadmissible.

It is equally clear that requesting an attorney is as effective a withdrawal and nullification of previous waiver as a verbatim invocation of the Fifth Amendment would be. Requesting an attorney must be regarded as at least a "change of mind" concerning the earlier waiver. Cf. *People v. Pervin*, 55 Cal. R. 847 (1967). Therefore, once an attorney has been called all interrogation must cease as if the defendant had explicitly reasserted his unwillingness to talk. *People v. Paulin*, 308 N.Y.S. 2d 883, *aff'd*, 255 N.E. 2d 164 (1969); *People v. Randall*, 464 P.2d 114 (Cal. 1970); *People v. Ireland*, 450 P.2d 580 (Cal. 1959).

> If at any time the suspect indicates 'in any manner' that he wishes to remain silent or that he wishes to consult with an attorney before speaking to police, there must be no further questioning, *even if an earlier waiver was validly obtained.*

Waiver of Rights in Police Interrogations, 36 Chicago L.R. 413, 419 (1969) (Emphasis Supplied).

In *Pierce v. State*, 451 S.W.2d 219 (Ark. 1970), the accused signed a waiver and then immediately called his attorney. The Court, noting that "the accused has an unqualified right to stop the questioning at any stage and request that he be permitted to consult with an attorney," held the subsequent confession inadmissible.

> *Where there is a request for an attorney prior to any questioning, as in this case, a finding of knowing and intelligent waiver of the right to an attorney is impossible . . .*

> If such a request is disregarded and the questioning proceeds, any statements taken thereafter cannot be a result of waiver but must be presumed a product of compulsion, subtle or otherwise.

United States v. Priest, 409 F.2d 491, 493 (5th Cir. 1969) (Emphasis Added). Any admission following a request for an attorney is inadmissible because such a request withdraws and nullifies any previous waiver.

> *A valid waiver ceases to be effective whenever the accused indicates in any manner that he wishes to remain silent or that he wants an attorney.*

Frazier v. United States, 419 F.2d 1161, 1166 (D.C. Cir. 1969) (Emphasis Supplied).

D. WHETHER ANY FORM OF WARNING GIVEN ON THE MORNING OF DECEMBER 27, 1970, COULD COMPORT WITH THE REQUIREMENTS OF *MIRANDA* WHEN THE POLICE OFFICER WHO CLAIMS TO HAVE GIVEN THE WARNING, INDUCES THE DAMAGING STATEMENTS AFTER THE PETITIONER'S ATTORNEY (OBTAINED FOR PETITIONER BY HER HUSBAND) LEFT THE POLICE STATION BECAUSE OF HIS ILLNESS, AND BEFORE THE ARRIVAL OF A SECOND ATTORNEY KNOWN BY POLICE TO BE ON HIS WAY TO REPRESENT PETITIONER, AND WHETHER SAID DAMAGING STATEMENTS ELICITED ON DECEMBER 27, 1970, CAN BE ADMITTED AGAINST HER AT HER STATE TRIAL.

The State has a heavy burden of showing that on December 27, 1970, Petitioner waived her constitutional right to counsel she requested on December 15 and which request was reiterated by her husband on December 27. This Honorable Court has set a high

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standard which the Respondents must here meet.

> If the interrogation continues without the presence of an attorney and a statement is taken, a *heavy* burden rests on the government to demonstrate that the defendant *knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.* . . . This Court has always set high standards of proof for the waiver of constitutional rights . . . and reasserts these standards as applied to in-custody interrogation . . .
>
> An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. *But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.* . . .
>
> Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.
>
> (Emphasis Supplied).

Miranda v. Arizona, supra, at 475

Nor can the State be heard to argue that after conviction it is the accused who bears the burden. In the Habeas Corpus proceeding, Petitioner has proffered evidence that she requested "her lawyer", a fact now admitted by the States' witnesses, police officers, who at the state trial denied what they now admit. In *Sullins v. United States*, 389 F.2d 985, 988 (10th Cir. 1968), the accused admitted having been given repeated *Miranda* warnings but asserted they requested counsel.

Law enforcement officers denied that any accused ever requested counsel but admitted that "at no time had any one of the four expressly said that he or she did not want to consult a lawyer before making a statement." Noting that the Government's heavy burden to show waiver cannot be discharged by presuming waiver from failure to ask for counsel, the Court held at 988 that:

> The testimony of the officers that none of the accused specifically declined consultation with a lawyer before answering questions is fatal to the admissibility of their inculpatory statements.

Somewhat analogous to the instant case is *United States v. Slaughter*, 366 F.2d 833 (4th Cir. 1966). Slaughter was arrested May 25, 1962, and warned of his rights, including his right to counsel. Slaughter did not then request a lawyer. Later that day two FBI agents arrived and advised him of his rights, including his right to counsel whereupon Slaughter made various statements before indicating his desire to cease answering and the interrogation stopped. On May 28, 1962, the United States Commissioner advised Slaughter of his rights, including his right to counsel. Slaughter stated ". . . that either he had an attorney who was not present, or that he knew of an attorney that he could get, and the hearing was adjourned." *Slaughter, supra*, at 837. Slaughter testified that later that day an FBI agent questioned him but he declined to make any statement. The next day, May 29, before Slaughter obtained counsel, two FBI agents interviewed him after reciting his rights, and during this interview Slaughter made statements which were later admitted into evidence. The Court, reversing and remanding for a new trial, framed the issue:

What, then, is the significance of an expressed

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> desire for counsel, followed by the taking, at the instance of the police, of incriminatory statements, preceded by a recitation of Appellant's formal rights, after expression of the desire for counsel, but before counsel had been obtained?

Slaughter, supra, at 839.

Factually, *Slaughter* is remarkably similar to Petitioner's case. In *Slaughter,* as in the case at bar, counsel had been requested. In Slaughter, a full warning of his rights (pre-*Miranda*) was then administered, whereas here no *Miranda* warning was given on December 27. In *Slaughter,* counsel was not present because not yet obtained; in the instant case counsel was not present because the damaging statement was taken, as the police well knew, between the time the sick lawyer left and his replacement arrived at the police station (D.C. Tr. 323). Finally, *Slaughter* is pre-*Miranda; Miranda* applies in full force to the instant appeal.

Even in the absence of *Miranda,* the Fourth Circuit declared at 841:

> Even if we disbelieve Appellant's assigned reason why he thereafter permitted himself to be interrogated, there is nothing in this record to support an *express change of mind on Appellant's part of his desire to consult counsel,* and a departure from his previously announced desire to exercise his right should not be lightly inferred. A statement that Appellant had a right to remain silent, on the facts here, was insufficient to overcome the respect to which his expressed desire to consult counsel was entitled. This statement here followed by a response to interrogation with nothing more, is insufficient to form a basis for waiver. (Emphasis Supplied).

According to *Slaughter,* once counsel has been requested, a mere warning of right to silence is "insuf-

ficient to form a basis for waiver." Likewise once Petitioner requested counsel on December 15 and had the request reiterated by her husband on December 27, the statement "Do you understand your rights?" is clearly insufficient to form a basis for waiver, particularly when the officers knew her lawyer had departed because of illness and a second lawyer had been summoned. Under these circumstances Petitioner was entitled to have counsel present during her interrogation.

It is axiomatic that the arguments advanced in this section and Section "C" assume that Petitioner was "in custody" on December 27, 1970. Respondents, in the District Court, for the first time in the history of this case, contended that Petitioner was not *in custody* on December 27. Such a contention is obviously frivolous and was not found to be controlling by the Court of Appeals.

However, anticipating that Respondents will assert that Petitioner was not in custody on December 27, 1970, the following is respectfully submitted.

The record below makes clear that Petitioner was indeed in custody on December 27, 1970. She was taken to the police station against her will, after advising the officers of her intent to leave the state to visit relatives (D.C. Tr. 85, 145-146). She was taken to the interrogation room area on the third floor where the door was *always* locked. Moreover, neither the person being interrogated or counsel can gain entrance to the room without the assistance of a police officer (D.C. Tr. 10-11).

The District Court made inquiry on this subject during Officer Reeves' direct testimony:

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BY THE COURT:

When a person is inside this room and you leave the room, I understand nobody can go back in there without a key from the outside. But, my question is whether or not anyone on the inside can leave the room without a key?

BY THE WITNESS:

No, sir. Now, they can leave the room but they can't leave the hall.

(D.C. Tr. 208).

Petitioner submits that the state of mind of Officer Reeves on this subject is revealed by the testimony elicited below on cross-examination:

A. I told her I would like for her to go.

Q. Did you know that you had no legal right to compel her to go, short of arresting her?

A. Yes, sir.

Q. Did you explain to her it is not necessary for you to come, it is simply my desire as a policeman. Did you make that statement?

A. No, sir.

Q. Did you leave her in your own mind with the impression that it was necessary for her to come?

A. No, sir.

Q. Then why didn't you tell her that it was not when she asked you that question?

A. She didn't ask me did she have to go.

(D.C. Tr. 229).

Officer Reeves then described the physical constraints on Petitioner after her arrival at the police station:

Q. And the door was locked leading out to the hall?

A. The hall door was locked, not the room door.

Q. Well, you couldn't get out of the hall without a key, could you? You had locked it when you

came in on that Sunday afternoon, hadn't you?

A. It was locked on the night before.

(D.C. Tr. 242-243).

Finally, Officer Price, testifying on direct examination below, admits that Petitioner was indeed taken into custody on December 27, 1970:

Q. Why did you request that they go to headquarters, why didn't you talk to them at their house?

A. This is a standard procedure of ours, that we like to talk to witnesses and defendants at our headquarters which is a good idea.

Q. Was she under arrest at that time?

A. No, sir.

Q. *What would have happened if she had refused to go?*

A. Well, she would've been made to go.

(D.C. Tr. 278) (Emphasis Supplied).

It is generally recognized in a *Miranda* context that interference with liberty, not formal arrest, triggers *Miranda* rights:

> A person 'detained' by the police in the field may not be 'free to go.' If only 'formal arrest' constituted 'custody' the police could frustrate *Miranda's* protective devices by 'detaining'; and thus delaying formal arrest.

Windsor v. United States, 389 F.2d 530, 534 (5th Cir. 1968). Clearly on December 27 and 28, Mrs. Biddy was detained and not free to go.

E. WHETHER DAMAGING ADMISSIONS AND CONDUCT OF PETITIONER, INDUCED BY THE POLICE WITHOUT ANY *MIRANDA* WARNING ON THE MORNING OF DECEMBER 28, 1970, AFTER HER ARREST AND

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WHEN THE POLICE WERE SPECIFICALLY TOLD BY PETITIONER'S COUNSEL THAT THEY WERE NOT TO FURTHER QUESTION HER, CAN BE ADMITTED IN EVIDENCE AGAINST HER AT HER STATE TRIAL.

On December 28, the police, knowing full well that Attorney Poole was coming to see Petitioner that morning, but without mentioning that fact to her, induced her to guide them to the reservoir location where the body was placed, which conduct and accompanying admissions were admitted into evidence (See Appendix F).

Before the Habeas Corpus proceeding, the record reflected only that on December 27 Attorney Poole told Detectives Reeves and Price that he did not want Petitioner to sign any statements. However, according to the District Court testimony of Attorney Poole, he not only proscribed signing anything, but told both Petitioner and the officers on December 27 that she was not to make *any* further statements (D.C. Tr. 7-8). Before the proceeding below the record reflected that the police demeaned Attorney Poole to Petitioner only on the morning of December 28, but testimony adduced from Petitioner now indicates that this process of subversion of trust in counsel was begun by police the night before (D.C. Tr. 154-157) and carried over to the morning of December 28 (D.C. Tr. 162).

The Court of Appeals found Petitioner's conduct on December 28 "voluntary," commenting at 123 that: "She insisted that this is what she wanted to do." Petitioner would take issue with this finding. On the morning of December 28, it is undisputed that the officers knew Attorney Poole had stated he would return

at 9:00 A.M. (a fact not mentioned in the opinion below) (D.C. Tr. 7-8). Yet, without advising the lawyer of their desire to interview Petitioner, and in the face of the attorney's direction that they not talk with her (a critical fact again not mentioned in the opinion below) (D.C. Tr. 7-8), she was guided into a police car after receiving promises of help (D.C. Tr. 182). Surely, this type of police activity falls within the conduct proscribed by *Miranda, supra.* If Petitioner agreed at all to go to the reservoir, it was only after her will was overborne by the officers. The bad faith of the police is amply demonstrated by their endeavor to impugn the integrity and competency of Attorney Poole (D.C. Tr. 154-157, 162). This uncalled for attack on Petitioner's lawyer was also overlooked in the opinion below. This caliber of conduct, clearly designed to destroy Petitioner's trust in her counsel, is contrary to the spirit of the Fifth and Sixth Amendments to the United States Constitution and to *Miranda, supra,* and its progeny.

For example, in *United States v. Wedra,* 343 F. Supp. 1183 (S.D. N.Y. 1962), Wedra was, on April 10, indicted, arrested and given the *Miranda* warning by a federal agent who was informed by Wedra's attorney that Wedra was not to be questioned without the attorney being present. Around 1:00 a.m., April 11, as the attorney left his client in custody, he advised him not to answer questions and advised federal agent Lepore that he did not want Wedra questioned in his absence. About ten minutes later, federal agent Pohl appeared and Lepore advised him that the attorney had advised his client not to answer any questions. Agent Pohl administered the *Miranda* warning and asked whether Wedra cared to make any statement, to which Wedra replied in the negative. Pohl then questioned Wedra,

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eliciting the statements in question.

The Court held that once counsel has been retained and is known to the interrogators, the right to have him present does not depend upon the accused's demand for his presence, where the interrogators have been advised and they have agreed that the accused will not be questioned in the absence of counsel. "The failure of the authorities to call defendant's attorney was tantamount to a denial of a request by defendant for his attorney as articulated by the attorney." *Wedra, supra*, at 1187. Accordingly, the Court found that the Government failed to sustain its burden of proving waiver of right to counsel. The Court also declared it would suppress the statement upon the completely distinct ground of the Court's supervisory power over the administration of justice. The Court noted that the questioning took place under "deceptive auspices," including *inter alia* the fact that Lepore "knew defendant had been advised not to answer questions except in the presence of his counsel; . . . he knew of the attorney's request that if there were to be any questioning the attorney was available. . . ." *Wedra, supra* at 1188.

The instant case is an analogous one in that Attorney Poole, on December 27, made it clear, both to Petitioner and to police, that she was to make no further statement and that he would return in the morning. That night, police belittled Attorney Poole in the eyes of his client. The only mention of Attorney Poole by police the next morning was a continuation of the process of demeaning him in her view. Without mentioning to Petitioner his statement to them that she was to make no further statement and without mentioning that he was on his way to see her that morning, the police

induced her to guide them to the incriminating spot at the reservoir, at which time she again made damaging statements (See Appendix F). All this was accomplished before Attorney Poole arrived to see Petitioner. The comment of the *Wedra* Court, *supra*, at 1188-89 is appropriate here:

> The totality of this conduct was unfair and overreaching, and the government should not be the beneficiary thereof . . .
>
> The only effective way to terminate this unfair and at times unethical practice is to prohibit the government from using its illicit fruits.

Clearly, the December 28, 1970, damaging statements and conduct of Petitioner were improperly admitted into evidence.

Viewed cumulatively, the police conduct of December 27 and 28, 1970 as heretofore set forth, should not be condoned if *Miranda v. Arizona, supra,* is to have continued viability and afford defendants the Constitutional guarantees safeguarded by its holding.

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CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing Petitioner's Brief upon Karen Gilfoy, Assistant Attorney General, P. O. Box 220, Jackson, Mississippi 39205, by depositing same in the United States Mail in a properly addressed envelope with adequate postage affixed thereto.

This the 13th day of January, 1976.

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